

MEMORANDUM OF LAW

DATE: May 31, 1989

TO: Deborah Graf, Library Department

FROM: City Attorney

SUBJECT: Questions Posed as to Compliance with Copyright  
Law

You requested an opinion as to whether the Supreme Court decision mentioned in the newspaper article attached hereto would mean that the City library would no longer need to comply with copyright laws. The case in question is called *BV Engineering v. University of California, Los Angeles*, 88-1099 (1989). The United States Supreme Court declined to hear a lower court case, *BV Engineering v. UCLA*, 858 F.2d. 1394 (9th Cir. 1988), which means that the lower court case ruling stands. In that case the court held that a state is immune from suit under the Eleventh Amendment to the U.S. Constitution. In other words, a state cannot be sued in Federal Court without the state's consent. Since the Copyright Act of 1976 is federal law, any suit under that statute must be brought in federal court. The court, in the case in question, found that UCLA could not be sued by the plaintiff, a computer company, for copying some of its programs.

An important aspect of that case is that the court specifically noted that, "The University of California and the Board of Regents are considered to be instrumentalities of the state." *BV Engineering v. UCLA*, 858 F.2d. at 1395. The question for us here is whether a municipality, for these purposes, can be considered an instrumentality of the state, and therefore similarly immune from a suit arising under copyright law. The cases on the issue seem to say it cannot be immune from such suits. There are certain criteria that must be met in order for courts to find that an agency is, in fact, an instrumentality of the state. The most important question is whether the agency is so independent that a judgment against it would not impact the state treasury. Clearly, the State of California treasury would not be affected by a judgment against The City of San Diego. Further tests include whether the entity performs an essential government function, whether it can sue or be sued, may take

property in its own name, and whether it conducts itself substantially independently of the state.

The Constitution of the State of California, article 11, sections 2 and 5, allows cities to become municipal corporations.

Section 1 of the Charter of The City of San Diego, states that the City shall be a municipal corporation, may sue and defend in all courts, and may own and acquire property.

Therefore, for purposes of this inquiry, The City of San Diego, and in turn, the library, are not instrumentalities of the state so as to be included in this immunity from copyright law. The library should continue to operate within the parameters of that statute.

Please let me know if I can be of further assistance.

JOHN W. WITT, City Attorney

By

Mary Kay Jackson

Deputy City Attorney

MKJ:jrl:273(x043.2)

cc William Sannwald

Attachment

ML-89-53